

FEDERAL MAGISTRATES COURT OF AUSTRALIA

HUANG v MINISTER FOR IMMIGRATION & ANOR [2012] FMCA 311

MIGRATION – Spouse visa – review of decision of Migration Review Tribunal (“Tribunal”).

ADMINISTRATIVE LAW – Formation of decision-maker’s opinion – criteria for lawful formation of opinion – availability of review of Tribunal’s factual findings.

Migration Act 1958, ss.65, 349, 359A, 474

Migration Regulations 1994, reg.1.15A, cl.309 of sch.2

Migration Amendment Regulations 2009 (No 7)

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611

Kayikci v Minister for Immigration & Citizenship (2009) 107 ALD 112

Applicant:	HONG HUANG
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1596 of 2011
Judgment of:	Cameron FM
Hearing date:	26 March 2012
Date of Last Submission:	26 March 2012
Delivered at:	Sydney
Delivered on:	18 April 2012

REPRESENTATION

Solicitors for the Applicant: Phoenix Attorneys

Solicitors for the Respondents: Minter Ellison

ORDERS

- (1) The application be dismissed.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG 1596 of 2011

HONG HUANG
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, Ms Hong Huang, is an Australian citizen who in May 2008 married a Chinese national, Mr Xinguo Chen. On 7 October 2008 Mr Chen and his dependent son, both of whom Ms Huang sought to sponsor to come to Australia, applied to the Department of Immigration and Citizenship for Partner (Provisional) (Class UF) subclass 309 visas. Their application was refused on 19 May 2009 by a delegate of the first respondent (“Minister”) who was not satisfied that Mr Chen and Ms Huang were “spouses” within the meaning of the *Migration Regulations 1994* (“Regulations”). Ms Huang, as the sponsor, subsequently applied to the second respondent (“Tribunal”) for a review of the delegate’s decision. She was unsuccessful before the

Tribunal and has applied to this Court for judicial review of the Tribunal's decision.

2. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error as that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
3. For the reasons which follow, the application will be dismissed.

Relevant law

4. The Partner (Provisional) (Class UF) visa is a temporary visa which enables a visa applicant to travel to and remain in Australia. A permanent partner visa may subsequently be granted but generally depends on whether the relationship has continued for a period of at least two years.
5. The primary criteria for the grant of a subclass 309 visa are set out in pt.309 of sch.2 to the Regulations. At the time of application, cl.309.211 relevantly provided:

309.21 Criteria to be satisfied at the time of application

309.211 (1) *The applicant meets the requirements of subclause (2) or (3).*

(2) *The applicant meets the requirements of this subclause if the applicant is the spouse of:*

(a) *an Australian citizen; or*

(b) *an Australian permanent resident; or*

(c) *an eligible New Zealand citizen. ...*

6. "Spouse" was relevantly defined in reg.1.15A as follows:

(1) *For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*

(a) *in a married relationship, as described in subregulation (1A); or*

(b) ...

(1A) *Persons are in a married relationship if:*

(a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*

(b) *the Minister is satisfied that:*

(i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

(ii) *the relationship between them is genuine and continuing; and*

(iii) *they:*

(A) *live together; or*

(B) *do not live separately and apart on a permanent basis.*

...

(3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*

...

(ae) *a Partner (Provisional) (Class UF) visa; ...*

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) *the financial aspects of the relationship, including:*

(i) *any joint ownership of real estate or other major assets; and*

(ii) *any joint liabilities; and*

(iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*

(iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*

- (v) *the basis of any sharing of day-to-day household expenses;*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one. ...*

7. Those provisions were replaced or amended by the *Migration Amendment Regulations 2009 (No 7)* but only in relation to visa applications made on or after 1 July 2009. Consequently, the version of the Regulations which applies in this case is the one which was in force at the time the visa application was made.

Background facts

Primary application

8. According to the details provided in the visa application form, Ms Huang has had two previous marriages and a de facto relationship. She has two children from her first marriage (a son and daughter) and two children from her de facto relationship (twin daughters). Mr Chen has also been married previously. His son from his first marriage was included in the visa application as his dependent. The application form also indicates that Mr Chen's most recent stay in Australia lasted from October 2002 until July 2008. He had been refused a protection visa in November 2002.
9. Mr Chen and Ms Huang provided almost identical statements in which they outlined the history of their relationship:
 - a) they met on 1 October 2007 at the Lidcombe Club where Mr Chen was celebrating his son's birthday;
 - b) they continued to spend time together at various places, kept in contact by telephone and visited each other's homes;
 - c) on 12 March 2008 Ms Huang telephoned Mr Chen and asked to see him. Later, when they met, Mr Chen proposed marriage and she agreed;
 - d) they started living together on 1 May 2008 and registered their marriage on 16 May 2008; and
 - e) they had a wedding party with twenty friends and relatives at a restaurant on 8 June 2008.
10. Enclosed with the application were statutory declarations from friends attesting to the genuineness of the relationship, over one hundred photographs, shopping dockets from Australia, correspondence, joint wills, airline tickets and telephone bills.
11. Mr Chen was interviewed by a departmental officer in Shanghai on 11 November 2008. Relevantly, he stated:

- a) he worked four to six days a week while he was in Australia;
 - b) he did not know how much Ms Huang earned because he did not like to ask her about money;
 - c) Ms Huang worked in a restaurant. She was probably a kitchen hand but he did not ask her for details;
 - d) Ms Huang had two previous marriages and two children from each marriage. He did not know when she divorced;
 - e) she had twins from her second marriage but he did not know their age or whether Ms Huang visited them when they were together, although she probably did and did not tell him; and
 - f) they were married in May 2008 but he could not remember the day.
12. On 19 May 2009 Mr Chen's visa application was refused by a ministerial delegate who was not satisfied that he and Ms Huang were in a genuine spousal relationship. The delegate noted that Mr Chen had not been able to name the street where he and Ms Huang had lived, had given contradictory evidence and was unaware of important dates or events in Ms Huang's life and of their relationship. The delegate also found that their photographs had been created for the purposes of the visa application and many were staged.

Review application

13. Ms Huang's application for review was accompanied by a statutory declaration in which she claimed the following:
- a) she and Mr Chen had established a joint bank account for their daily expenses and Mr Chen deposited money into that account at least once a month. She otherwise took care of all their financial affairs;
 - b) Mr Chen could not remember the name of their street because he did not speak English. He wrote it down in a notebook and referred to it when needed;

- c) they had a lot of photographs, including quite similar ones, because of the importance of the events being recorded. The photos of them shopping, walking outside or relaxing in their home were taken by friends for fun and without their knowledge;
- d) Mr Chen's previous unlawful status in Australia was not to be connected with the genuineness of their relationship;
- e) her twin daughters lived with their father at all times. As they were children from a previous relationship, she was reluctant to mention them in front of Mr Chen and as a result he did not know much about them. She visited the twins once or twice a week but did not tell Mr Chen about these visits;
- f) it was enough that Mr Chen knew where she worked without knowing the details. This was quite normal for Chinese couples;
- g) Mr Chen was not always considerate or careful and did not pay much attention to details such as the exact date of marriage; and
- h) Mr Chen was interviewed by the delegate after lunch and had been consuming alcohol. He was not given advance notice of the interview, was stressed and made mistakes.

14. Ms Huang appeared before the Tribunal on 1 February 2011 and made the following additional claims:

- a) she and her former de facto partner, the father of her twin daughters, separated in 2007. They had an arrangement where he would bring the children to a park and she would spend time with them. The last time she saw her former partner was in December 2010. Ms Huang later said, when the Tribunal questioned her about her former partner's criminal record, that she became aware in December 2010 that he had been sent to prison. Contact arrangements with her daughters were now organised between herself and her former partner's wife and son;
- b) Mr Chen never told her that between October 2007 and July 2008 he did not have a visa to remain lawfully in Australia. He never talked about his immigration status and she did not know about

any statements he might have made in support of any visa application;

- c) Mr Chen did not work regularly while in Australia, only one or two days a week; and
- d) they became engaged in January 2008. Mr Chen called her to ask her out on a date and met her at the Lidcombe Club where he then proposed.

15. The Tribunal took evidence from Mr Chen by telephone. He made the following claims:

- a) Ms Huang's twin daughters lived with their father. He did not know nor did he ask about the contact arrangements she had with her daughters as this related to matters in the past. Also, she did not talk to him about her contact arrangements and he respected her by not asking;
- b) he told Ms Huang after he returned to China that he had been living in Australia unlawfully;
- c) he proposed to Ms Huang in Chinatown in March 2008;
- d) he did not know where Ms Huang's son went to school or in what year he was enrolled; and
- e) he had been drinking on the day of the earlier interview and did not know how he had answered the questions.

16. On 1 April 2011 Ms Huang's advisers wrote to the Tribunal in response to a letter it had sent pursuant s.359A of the Act and made the following submissions:

- a) Ms Huang and Mr Chen became engaged on 12 March 2008. On the day of the proposal they went to a restaurant in Chinatown with Ms Huang's son and daughter. After dinner they took the children home and then went to the Lidcombe Club where Mr Chen proposed. Because they had been to several places that day, Mr Chen could not remember the exact place where he had proposed while Ms Huang remembered the wrong date but the right place;

- b) they had never really discussed each other's previous relationships in detail;
- c) while in Australia Mr Chen worked in the interior decorating business. However, work was very unstable and could range from five to six days a week when business was good to as little as one to two days a week or sometimes no work at all;
- d) their marriage was registered on 16 May 2008 and they had their wedding party on 8 June 2008. In the Chinese tradition, the date of registration was not as important as the date of the wedding party as the latter event signified recognition by their family and friends that they were a married couple;
- e) according to Chinese culture past failed marriages were frowned upon. Although he would never regard Ms Huang's past marriages as shameful he did not feel comfortable asking questions about them;
- f) they did not discuss Mr Chen's protection visa application before their marriage, which accounted for Ms Huang's lack of knowledge;
- g) Mr Chen did not know exactly what had gone on during his application for a protection visa so he did not discuss the details with Ms Huang and only told her before he proposed that he was an unlawful non-citizen;
- h) Mr Chen had not kept track of Ms Huang's son's education since he left Australia. He did not know the name of his school because his English was not good and it could not be translated into Chinese; and
- i) Ms Huang did not know that her former de facto partner was in prison until October 2010 when his wife informed her during a contact visit.

17. Enclosed with the submission was a number of documents including, amongst others, a statutory declaration from Ms Huang's daughter from her first marriage.

The Tribunal's decision and reasons

18. The Tribunal accepted that Ms Huang and Mr Chen were validly married on 16 May 2008. The issue before the Tribunal was whether they were “spouses” within the meaning of reg.1.15A, having regard to all of the circumstances of the relationship including the matters set out in reg.1.15A(3).
19. In relation to the financial aspects of their relationship, the Tribunal noted that Ms Huang and Mr Chen were living in different countries, had cohabited for a period of less than three months while in Australia and had spent a total of approximately six weeks together in China since July 2008. The Tribunal stated that it was not surprising in the circumstances that they did not have much in the way of joint assets or liabilities and that there was little evidence of any pooling of their financial resources.
20. In terms of the nature of their household, the Tribunal accepted that Ms Huang and Mr Chen had spent time together in Australia and in China but, given its concerns relating to the nature of their commitment, was not satisfied that they had established a joint household or had lived together as husband and wife.
21. In relation to the social aspects of their relationship, the Tribunal accepted that Ms Huang and Mr Chen had undertaken social activities together as evidenced by photographs, their written and oral evidence and the statements from their family and friends. However, these factors did not overcome the Tribunal's other significant concerns about the circumstances of the relationship and whether they were spouses for the purposes of the Act.
22. In determining the nature of their commitment at the time of application, the Tribunal identified several concerns. First, Ms Huang and Mr Chen did not provide a credible and consistent account of the circumstances in which their relationship developed. In the documents lodged with their primary application, they both stated that they became engaged on 12 March 2008. This was confirmed by Mr Chen at the hearing who said that he had proposed to Ms Huang on 12 March 2008 while they were on a date in Chinatown. However, at the hearing Ms Huang said that they became engaged in January 2008 when

Mr Chen proposed at the Lidcombe Club. While the Tribunal did not expect an applicant to remember every event in their life or in the course of a relationship, where the event was significant, such as the date or place of engagement, the Tribunal expected a general level of consistency in the written and oral evidence.

23. Secondly, Ms Huang and Mr Chen gave inconsistent evidence regarding the latter's work history in Australia. At the departmental interview Mr Chen stated that he had worked four to six days each week for which he was paid between \$800 and \$1,300 while at the hearing Ms Huang gave evidence that Mr Chen had worked one or two days per week. The Tribunal did not accept Ms Huang's explanation that the work undertaken by Mr Chen was unstable because, when answering questions about his salary, Mr Chen did not qualify his answers. This inconsistency indicated to the Tribunal that Ms Huang was unaware of Mr Chen's work schedule at a time when they claimed to have been cohabiting.
24. Thirdly, at the departmental interview Mr Chen stated that he was "probably" married in May but could not remember the date. The Tribunal considered that the date of marriage was a significant date in the development of their relationship and found that he should have been able to recall it less than six months later.
25. Fourthly, Ms Huang and Mr Chen had not discussed significant aspects of each other's lives:
 - a) Mr Chen did not know when Ms Huang had previously been married or divorced or that she had previously had three spousal relationships (two de jure marriages and one de facto) or from which relationship she had children. While the Tribunal accepted that one party might not wish to go into every detail of every past relationship, it expected an applicant to know some of the basic details of the most significant relationships, such as when the other party was previously married or divorced or with whom they had children;
 - b) Mr Chen did not know what contact arrangements Ms Huang had with her twin daughters and gave evidence that he did not ask her any questions about this;

- c) according to information before the Tribunal, the father of Ms Huang's twin daughters was imprisoned on 11 June 2010 for five years with a non-parole period of three years. Ms Huang gave evidence that she was aware in October 2010 that her twin daughters were no longer living with their father because he was in prison. However, Mr Chen's evidence was that Ms Huang's daughters lived with their father which indicated that she had not discussed the imprisonment of her former partner with Mr Chen;
- d) Ms Huang said at the hearing that she did not know what Mr Chen had claimed in his protection visa application or his visa status;
- e) Ms Huang stated at the hearing that when Mr Chen was in Australia he never told her that he did not have a visa to remain in the country lawfully. This was confirmed by Mr Chen who said at the hearing that he did not tell Ms Huang until after he left Australia that, apart from the first three weeks of their acquaintance, he had been living in Australia as an unlawful non-citizen. The Tribunal also noted in this regard that in her response to its s.359A letter, Ms Huang claimed that Mr Chen told her that he had been living unlawfully in Australia before the marriage proposal, which was inconsistent with their earlier evidence that he did not tell her until after he had departed; and
- f) Mr Chen did not know the name of the school attended by Ms Huang's son or in what year he was enrolled. The Tribunal noted that this was inconsistent with the statutory declaration of Ms Huang's daughter, who stated that Mr Chen often spoke to her and her brother and asked about their studies, because he would have been aware of these details had he done so.

26. Fifthly, the Tribunal found that Ms Huang had deliberately provided false and misleading evidence in relation to the contact arrangements she had with her twin daughters as well as the contact she had had with their father. Ms Huang gave evidence that she had met with the father of her twin daughters during a contact visit in December 2010 and had been in telephone contact with him shortly before the hearing to arrange a further contact visit. It was only after the Tribunal advised Ms Huang that it was aware that her former partner had been in prison

since June 2010 and, consequently, could not have met her or made arrangements for a contact visit, that Ms Huang admitted that she was aware that he had been imprisoned. In this regard, the Tribunal did not accept any of Ms Huang's various explanations because at the hearing it asked Ms Huang specifically about her relationship with her former partner including who was looking after the children and how she made arrangements with him to hand over her daughters. The Tribunal found that this conduct cast doubt on Ms Huang's overall credibility as a witness. It also cast doubt on her evidence that she and Mr Chen were in a genuine, ongoing and exclusive spousal relationship.

27. The Tribunal considered Ms Huang's explanation for the inconsistent evidence given at the departmental interview, namely, that Mr Chen had been under the influence of alcohol. However, the Tribunal did not accept this explanation as Mr Chen made no mention of it at the time of the interview, did not request another interview when he was not under the influence of alcohol and neither he nor Ms Huang asked the department to conduct a second interview or to consider the information that he was under the influence of alcohol.
28. The Tribunal found that the inconsistent evidence provided by Ms Huang and Mr Chen demonstrated that they had not discussed, or were aware of, significant aspects of each other's lives. This cast doubt on their claims to have had regular contact and to have communicated with each other as husband and wife. On the evidence before it, the Tribunal was not satisfied that, at the time of application, they had formed a genuine and continuing relationship and a long-term mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal noted that some of the evidence before it supported a conclusion that they were in a genuine spousal relationship at the time of application but found that this evidence was outweighed by the other factors which indicated that they had not been.
29. The Tribunal also had regard to the subsequent history of the relationship to determine whether it tended to show the existence of a genuine relationship at the time of application. The Tribunal accepted that Ms Huang had visited Mr Chen in China in 2008, 2009 and 2010 for a cumulative period of approximately six weeks and that they knew some basic information about each other. However, the subsequent

history of the relationship did not overcome the Tribunal's concerns about the relationship at the time of application. The Tribunal was not satisfied that the subsequent history of the relationship established that it was genuine and continuing at the time of application.

30. For these reasons, the Tribunal found that at the time of application Ms Huang and Mr Chen were not in a married relationship within the meaning of reg.1.15A(1). Consequently, Mr Chen was not Ms Huang's spouse within the meaning of reg.1.15A and therefore did not meet the requirements of cl.309.211(2) of the Regulations.

Proceedings in this Court

31. The grounds of the application commencing these proceedings were pleaded as follows:

1. *The Tribunal fell into jurisdictional error by failing to take account of relevant considerations in its application of sub-clause 309 of the Migration Regulations in its decision to affirm the delegate's decision not to grant the visa applicants Partner (Provisional) (Class UF) visas, in that it failed to give sufficient weight to the following matters despite accepting them as facts:*
 - (i) *At the time of the application and decision the visa applicant and review applicant were and are validly married to each other and therefore satisfied the definition under r.1.15A(1A).*
 - (ii) *The visa applicant and the review applicant spent time together in Australia and in China.*
 - (iii) *Because of the limited time of cohabitation in Australia (less than 3 months) and in China (six weeks) "it is not surprising that" there is little evidence of "any pooling of financial resources" at the time of the application.*
 - (iv) *The evidence of visa applicant's family members and friends gives support to the fact that the visa applicant and the review applicant are socially recognized as a couple.*
 - (v) *The review applicant's family members and friends give support to the fact that the visa applicant and the review applicant are socially recognized as a couple.*

- (vi) *There is evidence of electronic communication between the visa applicant and the review applicant.*
 - (vii) *The visa applicant and the review applicant know some basic information about each other.*
2. *The Tribunal fell into jurisdictional error by taking into account irrelevant considerations in its application of sub-clause 309 of the Migration Regulations in its decision to affirm the delegate's decision not to grant the visa applicants Partner (Provisional) (Class UF) visas, in that it overstated the significance of the following matters:*
- (a) *That the visa applicant was confused about the date of the engagement;*
 - (b) *That the visa applicant was confused about the place of the engagement;*
 - (c) *That the visa applicant and the review applicant gave inconsistent evidence relating to the visa applicant's work undertaken in Australia (indicating that the review applicant was not aware of the visa applicant's work schedule);*
 - (d) *That the visa applicant was not able to recall the act [sic] date of the marriage (within 6 months of the event);*
 - (e) *That the visa applicant was not aware that the review applicant had three previous relationships – two marriages and one de facto, nor was he aware of the review applicant's contact details with her twin daughters (despite the parties having informed the Tribunal that neither wished to pry into the other's former relationships or their respective arrangements for contact with their children);*
 - (f) *That the review applicant had not disclosed to the visa applicant or to her adult daughter or to the Tribunal that the father of her twin daughters was in prison and thereby deliberately provided false and misleading evidence in that regard to the Tribunal;*
 - (g) *That the visa applicant had not disclosed to the review applicant that he had previously applied for a protection visa and had been living in Australia as an*

unlawful non-citizen for most of the period of their relationship until he left Australia;

- (h) *That the visa applicant did not know in which year the review applicant's son was studying at the time of the interview.*

Applicant's submissions

32. Although Ms Huang pleaded her claim in terms of a failure to take relevant considerations into account and the taking of irrelevant considerations into account, in substance she alleged that in two different ways the Tribunal misapplied the tests found in the Regulations. The first way in which the Tribunal was said to have done this was by misapplying the mandatory considerations set out in reg.1.15A(3) in that it had regard to all the relevant information as a whole whereas, it was submitted, it should have reached a separate conclusion on each criterion and should only have reached an overall conclusion after having done so. The second way in which the Tribunal was said to have misapplied the tests was by only reviewing the application against the "time of application" criteria in cl.309.2 of sch.2 to the Regulations when it should also have considered whether the "time of decision" criteria had been satisfied.
33. It was also submitted that the Tribunal's conclusion regarding the parties' commitment to each other was flawed because it gave too little importance to the matters particularised in para.1 of the application commencing these proceedings and too much importance to the matters particularised in para.2.

Regulation 1.15A(3)

34. In relation to the first point, Ms Huang submitted that the Tribunal had regard to the nature of the household and the social aspects of the relationship criteria and reached conclusions which were broadly supportive of the visa application but then went on to accord greater significance to its concerns about her and Mr Chen's commitment to each other.

35. Contrary to Ms Huang's submissions, reg.1.15A(3) does not require the Tribunal to step *seriatim* through each of the identified criteria, to reach a conclusion on each of them and make a finding based on a formal weighing of each of those separate conclusions. The regulation states merely that the Minister (for whom here read the Tribunal: s.349 of the Act) must have regard to each of those circumstances as part of his consideration of all of the circumstances of the relationship. It does not stipulate the process by which he is to form an opinion whether two people are in a married relationship. Rather than prescribing a procedure by which the Tribunal is to arrive at its opinion, reg.1.15A(3) simply points to certain matters which must be taken into account as part of an overall consideration of the application.
36. In *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 652 [133] Gummow J relevantly cited with approval two statements of Sir John Latham:

In R v Connell; Ex parte Hetton Bellbird Collieries Ltd, Latham CJ said:

"[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist."

The Chief Justice added:

"It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide." (references omitted)

37. In *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 it was said:

At common law, a similar position had been reached earlier in Australia. From the classic dictum of Sir Owen Dixon in Avon Downs Pty Ltd v Federal Commissioner of Taxation was derived a list of matters upon which “satisfaction” could be reviewed. In considering a power of the Federal Commissioner of Taxation to make certain decisions based upon satisfaction as to the state of corporate voting power, his Honour said:

“His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.”

This statement of principle has been applied in numerous cases. The judgment of Gibbs J in Buck v Bavone accurately reflects the position prior to the enactment of the AD(JR) Act. His Honour said:

“It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a

very wide discretion which cannot be effectively reviewed by the courts.” (references omitted) (at 275-276)

38. Ms Huang’s complaint is not that the Tribunal failed to take into account the mandated considerations but that, it having done so, it reached one particular opinion rather than another. It was not submitted that the Tribunal’s opinion was not one that could be formed by a reasonable person: *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611. Absent error of the sort identified in *Eshetu, Wu Shan Liang* or *SZMDS*, no relevantly reviewable error is apparent in the Tribunal’s decision.
39. Consequently, the first matter raised by Ms Huang does not disclose error on the Tribunal’s part.

Time of application and time of decision criteria

40. Ms Huang submitted that the Tribunal was clearly wrong when it said in para.118 of its decision that:

As the visa applicant does not meet one of the time of application criteria, it is not necessary for the Tribunal to consider whether the visa applicant is the spouse of the review applicant at the time of decision.

41. In this regard, she referred to the decision of Tamberlin J in *Kayikci v Minister for Immigration & Citizenship* (2009) 107 ALD 112 where his Honour said:

It is also important to note, in relation to the mandatory considerations in subreg (3), that they are concerned with and focus directly on the relationship of the parties during a specific period, that is to say from the time of the application, on 28 February 2005, to the time of decision, on 29 November 2007, a period of more than 33 months. The emphasis is not specifically directed to considerations of events before the sponsor and the appellant began to live together in December 2004, and this emphasis is important in considering whether circumstances are relevant or irrelevant to the central issue as to the genuineness of the relationship.

Also pertinent to the genuineness of the relationship in this case are the observations of the Full Court in Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon

(Northrop, Wilcox and French JJ, 8 May 1990, unreported, BC9003390) where the Full Court observed that:

“ ... people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as “community expectations”. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.” (Emphasis added)

These observations emphasise that the relevant time for examination of the question of whether a marriage is genuine is the period over which the genuineness of the relationship must be decided, and that this is the central point of reference. It also indicates that the fact that a relationship may be seen to confer a benefit as to residence entitlement does not of itself mean that the relationship is not genuine. (at 116-117 [23]-[25])

42. His Honour also said, in the context of that case:

The issue to be resolved is the relationship with the sponsor after relations with his former wife had ceased in December 2003. (at 118 [36])

43. and went on to say that matters before that point were irrelevant and, in that case, should not have been taken into account by the Tribunal.

44. However, in *Kayikci Tamberlin J* was not called upon to apply cl.309 of sch.2 to the Regulations or to consider how that clause affects the Tribunal’s obligations under s.65 of the Act which relevantly provides:

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) *the health criteria for it (if any) have been satisfied; and*

(ii) *the other criteria for it prescribed by this Act or the regulations have been satisfied; and*

...

is to grant the visa; or

(b) *if not so satisfied, is to refuse to grant the visa. ...*

45. In this case, it is apparent that the Tribunal was not satisfied that Ms Huang met one of the time of application criteria. Because of ss.65(1)(a)(ii) and (1)(b), the inevitable consequence of this opinion was that the Tribunal had to affirm the delegate's decision to refuse the visa. As cl.309 required Ms Huang to meet both the time of application and time of decision criteria, once it was determined that the former were not satisfied and the visa could not be granted, there was no reason for the Tribunal to consider the latter.

Factual conclusions

46. Ms Huang's submissions concerning the Tribunal's reasoning in relation to the matters referred to in para.2 of the application do not point to error by the Tribunal. Those submissions were directed to the correctness of the Tribunal's factual conclusions but it was not submitted that those findings were irrational, illogical or unreasonable in the sense discussed in *SZMDS* or otherwise affected by legal error. In such circumstances, they cannot be reviewed by the Court.

Conclusion

47. Jurisdictional error on the part of the Tribunal has not been demonstrated.
48. Consequently, the application will be dismissed.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Cameron FM

Date: 18 April 2012